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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. **912**

BULLDOG ELECTRIC PRODUCTS CO.,
a Corporation of West Virginia,
Petitioner,

v.

WESTINGHOUSE ELECTRIC AND MFG. COMPANY,
a Corporation of Pennsylvania,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT THEREOF**

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INDEX TO PETITION

	PAGE
Statement	3
Jurisdiction	6
The question presented	6
Reasons for granting the writ	7
Conclusion	8

Authorities Cited

Enelow v. New York Life Insurance Company, 293 U. S. 379	7
Judicial Code, Section 24 (7) (28 U. S. C., Sec. 41-7)	6
Morton Salt Company v. G. S. Suppiger Co., 314 U. S. 488	8
Muncie Gear Works, Inc. v. Outboard Marine and Manufacturing, 315 U. S. 759	8
Section 129 of the Judicial Code (28 U. S. C. 227)	5
Section 240 (a) of the Judicial Code, as amended, (28 U. S. C., Sec. 347)	6
Shanferoke Coal and Supply Corporation v. West- chester Service Corporation, 293 U. S. 449	7





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PETITION FOR WRIT OF CERTIORARI



To the Honorable the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of
the United States:

Your petitioner, BullDog Electric Products Company
(BullDog) respectfully prays that a Writ of Certiorari
issue to review an order (R. 31) of the United States
Circuit Court of Appeals for the Second Circuit. That

order, entered on motion of respondent, Westinghouse Electric and Mfg. Company, (Westinghouse) dismissed, for want of appellate jurisdiction, an appeal from an order of the District Court for the Eastern District of New York, ordering that certain defenses commonly called unclean hands, or public interest defenses of monopoly and restraint of trade, set forth in detail below, be stricken from a Reply of the counter-defendant, BullDog, petitioner herein. The Reply was filed in response to a Counterclaim for declaratory judgment of invalidity and non-infringement, and for injunction against the petitioner's use and assertion of its own patent.

The Counterclaim was filed in a pending patent infringement suit by the defendant therein, Westinghouse, respondent herein.

STATEMENT

1. BullDog filed a patent infringement complaint against Westinghouse, based on several patents for Busway, a bus bar system for electrical distribution.

2. Westinghouse filed a conventional answer to the busway patent complaint of BullDog—and—in addition—counterclaimed (R. 9).

a) for a declaratory judgment of invalidity, and

b) for an injunction against BullDog's assertion and use of its (BullDog's) patent No. 2,285,770, relating to Circuit Breakers, a type of switch.

Neither this patent, No. 2,285,770 nor its subject matter, circuit breakers, were involved in the original complaint; they were introduced into the litigation for the first time by Westinghouse, in this declaratory judgment counterclaim.

The counterclaim or declaratory judgment action is thus seen to be in no way related to the original complaint but is rather a new, original, aggressive action, in equity, by Westinghouse against BullDog, seeking to destroy BullDog's patent and to enjoin BullDog's use or assertion of it.

3. In its Reply (R. 18) to that attacking counterclaim of Westinghouse for declaratory judgment and injunction, BullDog not only met the usual technical patent issues, but, in addition, pleaded certain defenses as follows:

A. The defenses of the business conduct of Westinghouse in circuit breakers, commonly called the public interest or unclean hands defenses, and directed to monopoly, unclean hands, price fixing, restraint of trade, conspiracy, etc. (Paragraphs of the Reply, Preamble, II, IX, X, XI, XII-1, XIII-2) (R. 18-24).

B. The defense that Westinghouse has abused the processes of the Courts by splitting up the circuit breaker patent controversy between the companies into two different jurisdictions.* (Paragraphs of the Reply, III, and XIII-3) (R. 19, 24).

C. The jurisdictional defense that the District Court lacks jurisdiction to decree invalidity, as contrasted with a decree of injunction against BullDog's enforcement of its patent. (Paragraphs of the Reply, XII and XIII-4) (R. 22, 24).**

4. On motion of Westinghouse, (R. 26) the District Court, on August 17, 1944 entered an order (R. 29) to strike these defenses from the Reply. (The Opinion of the District Court may be found at (R. 27).)

5. On September 5, 1944, BullDog noticed an appeal to the Circuit Court of Appeals (R. 30).

*Westinghouse sued BullDog, in West Virginia, on Westinghouse circuit breaker patents, only a few weeks, less than a month before it filed this declaratory judgment action by counterclaim in New York for invalidity of the BullDog circuit breaker patent, No. 2,285,770.

**This defense, raising the Constitutional question of jurisdiction, presents, for examination, a review of the functions of a District Court in a patent case.

6. Thereupon, Westinghouse moved to dismiss (R. 1) such appeal on the ground that the order of the District Court appealed from was not a final order of decision and therefore the Circuit Court of Appeals was without jurisdiction to entertain the appeal.

7. The Motion to Dismiss was granted and an order of dismissal entered by the Circuit Court of Appeals (R. 31), despite the argument of BullDog that the order of the District Court to strike the defenses was a denial of an injunction and therefore, although interlocutory, appealable under Section 129 of the Judicial Code (28 U. S. C. 227) permitting appeals from interlocutory orders denying injunctions.

8. There have been numerous other proceedings in this litigation, which ultimately, it is submitted, will bear upon the defenses stricken; but the issue here presented, though substantial in its effect upon petitioner's rights, is narrowed to the right to appeal upon the order to strike.

JURISDICTION

The matter to be reviewed arises in a suit under the patent laws of the United States, Judicial Code, Section 24 (7) (28 U. S. C., Sec. 41-7).

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, (28 U. S. C., Sec. 347).

The question involved is one of law, to be determined under the laws relating to equitable defenses, proceedings in equity, appellate jurisdiction, and the laws relating to patents; and was raised by respondent's Motions a) to strike, b) to dismiss the appeal.

There is also involved the question of pleadings and practice before a District Court, over which this Court has supervisory authority and jurisdiction.

THE QUESTION PRESENTED

Where a District Court, in a patent suit, refuses to try the equitable defenses of unclean hands or public interest, ordering them to be stricken out of the pleadings, and thus in effect refuses to stay consideration of the technical patent issues until after such equitable defenses are examined, that action of the District Court, it is submitted, refusing to stay the proceedings on the patent issues, is tantamount to a refusal to enjoin the proceedings on the patent issues, and therefore is a denial of an injunction, such as makes the interlocutory order appealable under Section 129 of the Judicial Code.

REASONS FOR GRANTING THE WRIT

A. This Court has ruled that where a District Court grants or refuses a stay against certain proceedings until after an equitable defense has been tried, such a grant or a refusal is a grant or refusal of an injunction, and is therefore appealable under Section 129, J. C. (*Enelow v. New York Life Insurance Company*, 293 U. S. 379; *Shanferoke Coal and Supply Corporation v. Westchester Service Corporation*, 293 U. S. 449.)

The unclean hands or public interest defense is an equitable defense and should be tried first, before proceeding on the technical patent issues, which are legal issues, triable at law, before a jury. When such defenses are stricken from a responsive pleading, it amounts to a refusal to stay the proceedings on the technical patent or law issues because it eliminates completely from the case the unclean hands or public interest equitable defense which should be tried first but which, because of the order to strike, in effect could not be tried at all.

Thus, the order of the District Court has the effect of refusing to try the equitable defense before the technical patent issues are examined, although it appears to be nothing more than an order to strike the equitable defense from the pleadings. By striking such defense from the pleadings, the order prevents the equitable defense from being tried at all, let alone being tried before the technical patent issues are examined.

B. This Court has permitted this type of defense to be tried, and the case disposed of, before the technical patent

issues are examined. (*Morton Salt Company v. G. S. Suppiger Co.*, 314 U. S. 488.)

C. A bar that is required, in patent cases, to represent the public interest adequately, (*Muncie Gear Works, Inc. v. Outboard Marine and Manufacturing*, 315 U. S. 759) must be permitted to plead the public interest defenses and to have such public interest defenses examined before proceeding on the technical patent issues. Otherwise, the recent admonition of this Court to regard the public interest as paramount would, as in this case, be ignored and the exercise of this duty would rest wholly in the discretion of the particular trial judge.

CONCLUSION

Wherefore, it is urged that this petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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